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No. 685

In the

Supreme Court of the United States

OCTOBER TERM, 1962

GORHAM & JOHNSON, INC.,

Petitioner,

v.

CHRYSLER CORPORATION, CHRYSLER MOTORS CORPORATION, SIMCA, S. A. OF FRANCE, SIMCA, INC. AND C. S. HAMILTON MOTOR COMPANY,

Respondents.

REPLY BRIEF OF RESPONDENTS CHRYSLER CORPORATION AND CHRYSLER MOTORS CORPORATION

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Chrysler Corporation and Chrysler Motors Corporation hereby submit their Reply Brief in opposition to the Petition for Writ of Certiorari filed herein on December 21, 1962.

QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that the claimed errors were harmless and did not affect the substantial rights of petitioner for this reason: the unchallenged

finding of the jury that petitioner was not damaged by the agreement under which Chrysler became the exclusive distributor of Simca automobiles in the United States precludes recovery upon any of the purported causes of action asserted by petitioner—all of which were predicated upon this exclusive distributorship agreement which, as conclusively found by the jury, did not damage petitioner.

STATEMENT OF THE CASE

Respondents object to both the "Questions Presented" and the "Statement of the Case" in the Petition for Writ of Certiorari.

The first four of the "Questions Presented" by petitioner, regarding the correctness certain rulings of the district court, are *not* before this Court. The Court of Appeals below did not even consider whether or not such rulings of the trial court were erroneous; to the contrary, it simply held that the claimed errors were harmless and did not affect the substantial rights of petitioner because of the conclusive effect of the jury's answer of "no damages" to Special Issue No. 5 (308 F. 2d 462, at 468-69). The sole question presented by the present petition for certiorari is whether or not this Court should exercise its discretion to review the correctness of this singularly narrow decision—not whether, as claimed by petitioner and denied by respondents, the trial court's rulings complained of by petitioner are erroneous.

The "Statement of the Case" contained in the Petition for Writ of Certiorari is objectionable not only because that statement omits any reference to some very material and

determinative facts which were established at trial, but also because it presents—as established facts—several assertions which were not proven at trial and which are, in fact, contrary to the undisputed evidence.[1] The erroneous statements made by petitioner are simply pointed out by footnote since they are not directly involved in the single question now before this Court; and, since most of the salient facts omitted in petitioner's statement are summarized in the opinion of the Court of Appeals below (308 F. 2d at 463-68), they are not repeated at length herein.

As demonstrated by the opinion of the Court of Appeals, petitioner initially asserted four supposed causes of action, all of which were *admittedly* based on precisely the same set of facts: the "Basic Agreement" between Chrysler and H. T. Pigozzi and the resultant "Motor Products Agreement" under which Chrysler Motor became the exclusive distributor of Simca products in the United States (R. 13-43; 308 F. 2d at 463-64). Petitioner asserted that this single set of facts, at one and the same time, constituted (i) a tortious inter-

[1]Petitioner's Statement of the Case is erroneous in the following particulars:

(i) Kurland Motors did not *import* Simca automobiles into the United States (308 F. 2d at 466-67; R. 333-34, 355-56);

(ii) Chrysler's decision to obtain a small foreign car for distribution took place in July and August of 1957, not "at about the same time" petitioner entered into its dealership agreement with Kurland Motors; indeed, petitioner became aware in early August by means of newspaper announcements that Chrysler was "becoming the sole distributor of Simca products in the United States"—some three or four weeks *before* it entered into its dealership agreement with Kurland Motors, on August 29, 1958 (R. 335-39, 345, 375-77, 151-54; 308 F. 2d at 467).

(iii) Chrysler did not "oust" all existing Simca distributors and dealers in the United States; to the contrary, a number of such existing Simca dealers who, pursuant to the initial letter which they received from Chrysler Motors, made application to continue under Chrysler Motors, were appointed as Simca dealers by Chrysler Motors (308 F. 2d at 466; R. 240-52, 343-44);

(continued on page 4)

ference with its "relational interests" or "commercial expectancies"; (ii) a violation of § 1 of the Sherman Act; (iii) a violation of § 2 of the Sherman Act; and (iv) a violation of § 7 of the Clayton Act (on the theory that Chrysler's acquisition of some 25% of the stock of French Simca allegedly resulted in the exclusive distributorship agreement complained of by petitioner).

Prior to trial, petitioner's claim of tortious interference was dismissed by the district court (R. 350-51); this did not, however, preclude petitioner from fully developing *all* of the facts of its case during trial since the common law tort action was admittedly grounded "upon precisely the same facts alleged in support of the antitrust violations" (308 F. 2d at 464, fn. 4; R. 38). Following the presentation of all of the evidence, the trial court refused to submit to the jury petitioner's submitted instructions and special issues regarding § 2 of the Sherman Act and § 7 of the Clayton Act; of course, this ruling did not preclude the full development of petitioner's case at trial—since it did not occur until after all of the evidence had been presented (R. 268-71).

(fn. 1—continued)

(iv) the inference that Kurland Motors received a "cash settlement" because it made claims of antitrust violations and tortious interference like those asserted by petitioner in the instant case is fallacious; the settlement with Kurland was simply based upon Kurland's position that it was entitled to reasonable but not less than six months' notice of termination of its Simca distributorship agreement (308 F. 2d at 467; R. 115-19, 346-47);

(v) petitioner, conceding that it would be pure speculation to attempt to show damages in this respect, did not even allege or atempt to prove a separate "group boycott" or conspiracy to destroy its business as a "bootleg dealer"; thus, these references in petitioner's Statement of the Case are purely superfluous (308 F. 2d at 468; R. 266);

(vi) the representation that Stipulation Exhibit No. 35, an audit prepared by an accountant employed by Chrysler (which is not included in the printed record), affirmatively and undisputedly shows

(continued on page 5)

Then, the district court submitted petitioner's claim under § 1 of the Sherman Act to the jury, upon special issues, in a unique manner. Special Issue No. 2, couched in the statutory language of "contract, combination or conspiracy," inquired about the existence of a fact as to which there was no dispute and which, indeed, the parties had stipulated to be true and correct—i.e., whether Chrysler entered into a contract or agreement with H. T. Pigozzi and French Simca in which it was agreed that Chrysler would be the exclusive distributor of Simca automobiles in the United States (R. 283, 340-42).

After submitting this issue over the objections of respondents (R. 269), *which issue could be answered only in the affirmative*, the trial court then required the jury to find, by Special Issue No. 4, whether the exclusive distributorship agreement inquired about in Special Issue No. 2 was an unreasonable restraint of trade within the meaning of § 1 of the Sherman Act, as that phrase was defined in the charge (R. 284). However, the district court did not ask the jury to determine the amount of damages sustained by petitioner

(fn. 1—continued)

that petitioner was damaged because its business operated at a profit and would have continued to do so but for the exclusive distributorship agreement is completely fallacious and misleading (Petition for Writ of Certiorari pp. 7-8, 20). Not only does this assertion very conveniently omit reference to the fact that Stipulation Exhibit No. 35 demonstrated that petitioner's business did not operate at a profit (R. 139-42, 185)—it also completely disregards the fact that the jury's finding of "no damages" was based on substantial and sufficient evidence that the alleged failure of petitioner's business "resulted from any one of numerous causes" other than the exclusive distributorship agreement (308 F. 2d at 468; see subsequent discussion on page 16 of this Brief);

(vii) there is no evidence whatever in the record that would show the disposition of the suit which petitioner filed against Kurland Motors for damages based on the claim that Kurland misrepresented its authority to give petitioner a Simca franchise (308 F. 2d at 467; R. 174-75, 188-89).

as a result of the unreasonable restraint of trade inquired about in Special Issue No. 4. Instead, the jury was required by the final special issue (Special Issue No. 5) to ascertain:

> "What sum of money, if any, would fairly and reasonably compensate the plaintiff for the damage, if any, sustained by him as a direct result of the *conspiracy*, if you have found same to exist?" (R. 284) (Emphasis added).

As the Court of Appeals pointed out, while the word "conspiracy" sounds sinister, it was used in this case as being synonymous with "contract"; the trial court's charge to the jury explains: "A conspiracy—and 'contract', 'combination' and 'conspiracy' mean essentially the same thing in this case—is an agreement between two or more persons shown by words or by deeds" (R. 274; 308 F. 2d 468). And, as stated above, the jury had no choice but to find the existence of such a "conspiracy" (i.e., contract or agreement) in response to Special Issue No. 2, for it had been expressly conceded and stipulated that Chrysler, H. T. Pigozzi and French Simca had entered into an agreement under which Chrysler was to become the exclusive Simca distributor in the United States (R. 283, 340-42; 308 F. 2d at 468).

Thus, it is evident that *Special Issue No. 5 simply required the jury to ascertain the damages, if any, sustained by petitioner as a result of the exclusive distributorship agreement* (i.e., "conspiracy") inquired about in Special Issue No. 2 (308 F. 2d at 469).

This unusual submission was, in fact, the direct result of petitioner's now abandoned theory that the agreement under which Chrysler became the exclusive Simca distributor in the

United States was a *per se violation* of § 1 of the Sherman Act, and that, therefore, petitioner was not required to demonstrate that this exclusive distributorship caused injury to the public and was an unreasonable restraint of trade in order to recover upon its private antitrust action (R. 70-75, 194-98). While expressing serious doubts that there was any such per se violation (R. 220, 198), the trial court—in order to submit the question of damages both as to the asserted per se violation and the asserted unreasonable restraint of trade—deliberately conditioned the damage issue upon the exclusive distributorship itself (308 F. 2d at 469).

Under this submission, if the exclusive Simca distributorship agreement—i.e., the "conspiracy" which the jury necessarily had to find in response to Special Issue No. 2, since its existence was expressly stipulated and conceded by the parties—were held to be a per se violation, petitioner could recover the amount found in response to the damage issue even if the jury found no unreasonable restraint of trade. Contrariwise, if the exclusive distributorship agreement were held not to be per se illegal under § 1 of the Sherman Act, then petitioner could recover the damage stated in the answer to Special Issue No. 5 only if the jury found that the exclusive distributorship agreement was an unreasonable restraint of trade.

The jury found, in the course of its deliberations, that the exclusive distributorship agreement was not an unreasonable restraint of trade (R. 284). Then, the jury directed a note to the district court which, in substance, inquired whether, since this was an antitrust case, it would be necessary for

them to answer Special Issue No. 5 regarding damages inasmuch as they had found, in response to Special Issue No. 4, that the "contract, combination or conspiracy inquired about in Special Issue No. 2" was not an unreasonable restraint of trade. The trial judge—by replying to this written note "that the matter inquired about had been covered by the instructions contained in the charge of the Court and that no further instructions or interpretation was required"—directed the jury to continue its deliberations and ascertain what damages, if any, were caused to petitioner by the exclusive distributorship agreement (R. 316-17).

The jury then proceeded to find, in accordance with these instructions and in response to Special Issue No. 5, that *the agreement under which Chrysler became the sole and exclusive Sima distributor in the United States*—upon which all four of petitioner's purported courses of action were admittedly based—*did not damage petitioner*. That this finding of "no damage" is, without doubt, based upon and fully supported by substantial evidence, is demonstrated by the factual summary in the opinion of the Court of Appeals (308 F. 2d at 465-68; infra at fn. 5).

ARGUMENT

Petitioner made no attack whatever in the trial court upon the jury's finding of "no damages", either by motion for new trial or otherwise, and has made no complaint on appeal as to the sufficiency of the evidence to sustain this finding of the jury. Indeed, as the Court of Appeals emphasized, "No error of any kind is claimed which would impeach or affect the

jury's verdict on that [the damage] issue" (308 F. 2d at 468).

Clearly, the claimed errors (Questions 2, 3 and 4 in the Petition for Writ of Certiorari) regarding the dismissal before trial of the common law count for tortious interference and the rejection after presentation of all the evidence of the tendered issues and instructions pertaining to § 2 of the Sherman Act and § 7 of the Clayton Act do not. Since all four of the purported causes of action were based upon precisely the same facts, these rulings of the trial court did not prevent petitioner from fully and completely developing all aspects of this single set of facts, both as to alleged liability and supposed damages; in fact, examination of the Record reveals that *none of the evidence offered by petitioner to prove that it was damaged was excluded*, even though the district judge conceded that much, if not all, of petitioner's damage evidence was speculative and "little more than a guess" (R. 143-45, 275-77).

Similarly, it is equally apparent that the claimed error (Question 1 in the Petition for Writ of Certiorari) regarding the exclusion from evidence of the Senate Subcommittee Reports marked at trial as petitioner's Exhibits 40 and 41 does not impeach or affect the jury's finding of "no damages". Admittedly, such exhibits were offered by petitioner *only* for the purpose of proving its claim that the exclusive distributorship agreement was an unreasonable restraint of trade; such subcommittee reports obviously were not relevant to the question of what damage, if any, petitioner sustained as a result of the exclusive distributorship agreement—and

petitioner has at no time, during either the trial or this appeal, professed that these exhibits were relevant to the damage issue or that it attempted to introduce them in evidence for that purpose[2] (308 F. 2d at 468-69).

Therefore—in the absence of any attack or complaint at trial or on appeal, or any claimed error which would impeach or affect the jury's finding of "no damages"—the jury's answer to Special Issue No. 5 conclusively establishes that petitioner was not damaged by the agreement under which Chrysler became the exclusive distributor of Simca automobiles in the United States. Of course, the jury's conclusive finding that the exclusive distributorship agreement did not damage petitioner precludes any recovery upon the basis of this agreement, regardless of the nature or caption of the supposed cause of action, whether §§ 1 or 2 of the Sherman Act, § 7 of the Clayton Act, or a common law tort. Thus, since all four of the purported causes of action asserted by petitioner were admittedly based on the exclusive distributorship agreement—which the jury definitively found did not damage petitioner—there can be no recovery upon any of the legal theories advanced by petitioner (308 F. 2d at 468-69).

Accordingly, since petitioner was precluded from recovery upon any of the four purported causes of action by the jury's finding of "no damages", the Court of Appeals correctly held that it need not go through the superfluous motion of

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[2] Moreover, as discussed subsequently herein on pages 18-19, the trial court was manifestly correct in excluding Exhibits 40 and 41 on the basis of the hearsay evidence rule.

considering the merits of the claimed errors asserted by petitioner. As that Court stated:

> "* * * The jury's answer, therefore, established that the plaintiff sustained no damage under any legal theory which it had asserted.
>
> "That finding forecloses plaintiff from any relief on any theory of violation of the antitrust laws, for a private suit under those laws is permitted only by 'any person who shall be injured in his business or property by reason of any thing forbidden in the antitrust laws'. 15 U.S.C.A. §15. It demonstrates that any possible error in dismissing the second count of the complaint claiming for a common-law tort 'upon precisely the same facts alleged in support of the antitrust violations' would be error without injury. It precludes a ruling on plaintiff's 'Fourth Point' directed to the exclusion of plaintiff's Exhibits 40 and 41 which are relevant to the existence of an unreasonable restraint of trade or commerce and not to the question of damages." (308 F. 2d at 469).

See *Kidd v. Esso Standard Oil Co., 295 F. 2d 497 (6th Cir. 1961)* (the jury's finding of "no damages" precludes recovery by the plaintiff even though the jury also found that there was illegal price discrimination); *Freedman v. Philadelphia Terminals Auction Co., 197 F. Supp. 849 (E.D. Pa.*

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[3] Contrary to this indication, neither Exhibit 40 (which resulted, of course, in the passage of the "Dealer's Day-In-Court" statute, 15 U.S.C. §§1221-25, designed to cure the conditions described in that report) nor Exhibit 41 (which report never resulted in any legislation) contains evidence relevant or material to the present case, which simply concerns an exclusive distributorship agreement. Actually, the Court of Appeals did not have to determine whether these exhibits were relevant to the issue of unreasonable restraint of trade, since it was readily apparent that they were not relevant to and were not offered on the question of damages. Accordingly, respondents suggest that the Court of Appeals merely meant to say at this point that Exhibits 40 and 41 were relevant, *if at all*, to the issue of unreasonable restraint and not to the issue of damage—especially since that Court stated earlier in its opinion that these exhibits *might* go to the issue of unreasonable restraint, not that they *would* (308 F. 2d at 468).

1961), aff'd 301 F. 2d 830 (3rd Cir. 1962), cert. denied, 9 L. Ed. 2d 67 (Oct. 8, 1962) (Simile).

Petitioner's sole attempt to avoid the determinative effect of the jury's finding of "no damages" is this specious argument: the jury was confused and preplexed over the effect of their finding of "no unreasonable restraint of trade" upon the damage issue and, for this reason, its finding of "no damages" was affected to petitioner's prejudice by the trial court's rejection of the three additional purported antitrust and common law tort causes of action and the exclusion from evidence of petitioner's Exhibits 40 and 41 (Petition for Writ of Certiorari pp. 13-22).

Supposedly, this "confusion and perplexity" on the part of the jury is shown by two things: (i) the fact that all of the jury's findings to the special issues were in petitioner's favor, except for the very last two regarding whether the exclusive distributorship agreement was an unreasonable restraint of trade and whether that agreement damaged petitioner; and (ii) the jury's note to the trial judge inquiring whether it would be necessary for them to answer the damage issue since they had found no unreasonable restraint of trade (Petition for Writ of Certiorari p. 19). And, the contended "prejudice"—which supposedly resulted to the jury's answer of the damage issue from the district court's dismissal of the common law tort action, rejection of the tendered issues and instructions pertaining to § 2 of the Sherman Act and § 7 of the Clayton Act, and exclusion of petitioner's Exhibits

40 and 41—is said to be demonstrated by the following suppositions:

(1) if the jury had been allowed to consider petitioner's Exhibits 40 and 41, they *might* have found that the exclusive distributorship agreement was an unreasonable restraint of trade and, then, *might* have found that petitioner was damaged by this agreement;

(2) if five liability issues had been submitted to the jury instead of only one, the jury *might* have answered one of the five in favor of petitioner and, then, *might* have found that the exclusive distributorship agreement caused damage to petitioner (Petition for Writ of Certiorari pp. 19-20).

This argument is not only utter speculation and conjecture, it is completely without foundation. The jury's supposed "confusion and perplexity" is non-existent. Certainly, no such bewilderment on the part of the jury as contended by petitioner is shown by the fact that the first three issues were answered in favor of petitioner and the last two in favor of respondents—especially since the first two issues inquired about the existence of facts which were conceded and undisputed.[4] Similarly, the jury's note to the district judge does not show any such confusion or perplexity; to the

[4]Although respondents denied, for various reasons, the claim that petitioner became an *authorized, franchised* Simca dealer by entering into the Dealer Sales Agreement with Kurland Motors (R. 62, 67-72), it was undisputed and stipulated that petitioner did sign such agreement and did purchase 31 Simcas from Kurland for resale (R. 139-41, 334-35); thus, the jury was compelled to give an affirmative answer to Special Issues Nos. 1 and 1(a) which simply asked—in accordance with the issues tendered by petitioner—not whether petitioner became an authorized, franchised Simca dealer, but whether it "established a business in Dallas for retail dealing in Simca automobiles * * * distributed in the Dallas area by Kurland Motors" (R. 82, 96-97, 282). Similarly, as explained previously on pages 5-6 of this Brief, the jury could answer Special Issue No. 2 only in the affirmative, for the making of the agreement under which Chrysler became the exclusive Simca distributor in the United States was stipulated and undisputed (308 F. 2d at 486; R. 340-42).

contrary, as the Court of Appeals indicated (308 F. 2d at 469), this note merely emphasizes the fact that the jury was instructed, not only by the charges and special issues but also by the trial court's reply to this note, to ascertain what damages, if any, were caused by the exclusive distributorship agreement—and that the jury, in accordance with these instructions, in fact found that this agreement did not damage petitioner.

Likewise, the supposed prejudice which forms the predicate of petitioner's argument, by which the jury "*might* have been persuaded to render a different verdict" as to the damage issue, is equally non-existent—except in the unfounded conjecture of petitioner. Even if additional liability issues regarding the purported common law tort, § 2 of the Sherman Act and § 7 of the Clayton Act had been submitted to the jury, and even if the trial court had permitted the introduction into evidence of Exhibits 40 and 41, *the issue regarding damages would have remained unchanged;* that is, the jury would simply have been asked (as it was in Special Issue No. 5) to determine the damage, if any, caused to petitioner by the exclusive distributorship agreement, upon which all of the purported causes of action were admittedly based. Therefore, it is evident that petitioner's speculative suppositions of prejudice—that the jury *might* have found that the exclusive distributorship agreement did damage petitioner if five liability issues instead of one had been submitted or if Exhibits 40 and 41 had not been rejected—necessarily assumes that the jury, in some undesignated and unexplained manner, completely disobeyed the trial court's

instructions and the special issues and did not ascertain what damages were caused to petitioner by the exclusive distributorship agreement. No extended discussion is required to demonstrate that such an attempt to upset the jury's conclusive finding of "no damages", on the basis of conjecture and speculation which has no foundation whatever in fact, is directly contrary to the fundamental principles that an appellate court will indulge every reasonable intendment in favor of a jury verdict and will not overturn a jury finding unless there is no evidence to support it. See *7 Moore, Fed. Prac. §§ 61.07, 73.07 (1955); 14 Cyc. Fed. Proc. § 67.31, pp. 217-22 (1952).*

It is evident that the above-discussed argument advanced by petitioner is, purely and simply, an indirect and collateral attack upon the sufficiency of the evidence to sustain the jury's finding of "no damages"; that this is so is graphically illustrated by the patently erroneous statement, made by petitioner on page 20 of the Petition for Writ of Certiorari, that the jury's "confusion and perplexity" and the resultant prejudicial effect upon its answer to the damage issue is "demonstrated by the fact that the existence of some damage was undisputed and affirmatively reflected by Stipulation Exhibit No. 35 (the discussion above in section "vi" of fn. 1 demonstrates that this statement is completely fallacious).

Of course, no such indirect and collateral attack can now be made upon the jury's verdict on Special Issue No. 5. This finding of "no damages" is conclusive and binding upon petitioner and the appellate courts (*308 F. 2d at 468-69*)

because petitioner (i) did not preserve this question for review on appeal by making an appropriate post-trial motion (motion for new trial or otherwise) challenging the sufficiency of the evidence to sustain this finding; (ii) did not present for review on appeal a record containing *all* of the evidence presented at trial; and (iii) did not specify any such complaint as error in the Court of Appeals below, either in the statement of points to be relied upon required by Rule 75(d) of the Federal Rules of Civil Procedure, or in the specification of errors in the Brief for Appellant required by Rule 24(2)(b) of the Rules of the United States Court of Appeals for the Fifth Circuit—all of which are indispensable prerequisites to any appellate review of a question of sufficiency of the evidence to sustain a particular jury finding. *Baten v. Kirby Lumber Corp., 103 F. 2d 272 (5th Cir. 1939); 14 Cyc. Fed. Proc. § 67.21 (1952).*

Moreover, even if such an indirect and collateral attack upon the sufficiency of the evidence to support the jury's finding of "no damages" were permitted, there is no question that it would be unavailing. As the Court of Appeals pointed out, after summarizing some of the salient facts in this case, the jury could reasonably have believed that the failure of petitioner's business as a retail dealer in Simca automobiles resulted—not from the agreement under which Chrysler became the exclusive Simca distributor in the United States—but from:

> "* * * any one of numerous causes. (i) Inadequate capitalization, (ii) plaintiff's failure and refusal to apply to Chrysler for a dealership, (iii) its failure to seek a dealership in any other cars, (iv) the increase of freight charges by Kurland, and (v) Kurland's al-

leged misrepresentation of its authority *are but a few of the possible causes of plaintiff's loss.*"[5] *(308 F. 2d at 468)* (Emphasis and divisional numbers added).

Thus, it is clear that the present appeal is not, as petitioner claims, a case of monumental importance; it does not involve "vital procedural and evidentiary problems" * * * and it is, most certainly, not "superlatively important to the jurisprudence of this country as a whole" that this Court issue a Writ of Certiorari. To the contrary, the decision in this case clearly affects no one besides the present litigants because it simply involves a single jury finding that the agreement under which Chrysler became the exclusive Simca distributor in the United States did not damage petitioner.

This finding of "no damages" is conclusive not only because petitioner "filed no motion for new trial in the district court, and makes no complaint on appeal as to the sufficiency of the evidence to sustain the verdict of the jury" on this damage issue *(308 F. 2d at 468)*, but also because the jury's conclusion that petitioner was not damaged by the exclusive distributorship agreement is manifestly supported by the evidence. And, the effect of this finding is evident since all four of petitioner's purported causes of action were admittedly based upon the exclusive distributorship agreement—*which did not damage petitioner*—there could be no

[5]To this partial list may be added (vi) petitioner's improvidence and unreasonableness in disregarding the public announcements that Chrysler Motors was to become the sole distributor of Simca products in the United States—which public announcements were known to L. H. Johnson, Jr. and Paul R. Gorham (who incorporated and conducted the business of petitioner corporation) *prior* to the date they incorporated or put any money into petitioner, and *prior* to the date on which they entered into the Dealer Sales Agreement with Kurland Motors (R. 149-57, 185, 334-35, 375-77); (vii) the collapse of the foreign car market in the United States which began in 1960 and which would have prevented petitioner from operating its business at a profit even if it had continued its purported Simca dealership (R. 148-49, 235-36, 253-65, 381-87).

recovery under any of the legal theories asserted by petitioner, whether labeled common law tort, §§1 or 2 of the Sherman Act, or §7 of the Clayton Act.

The result, therefore, is that *none of the four errors claimed by petitioner*—exclusion from evidence of Exhibits 40 and 41, rejection of tendered issues and instructions pertaining to §2 of the Sherman Act and §7 of the Clayton Act, and dismissal of common law tort action (Questions 1, 2, 3 and 4, respectively, presented in Petition for Writ of Certiorari)—*can amount to reversible error*. Just as the Court of Appeals had no reason or occasion to consider any of these asserted errors since the finding of "no damages" was an insurmountable obstacle to recovery on any of petitioner's purported causes of action, the issues which petitioners alleges are of superlative importance (including the supposed "need for this Court to supply a definitive analysis of §2 of the Sherman Act") would not be before this Court even if certiorari were to be granted.

Finally, respondents would demonstrate, very briefly, that even if these claimed errors were reached, the trial court's rulings of which complaint is made by petitioner were not erroneous, but were manifestly correct; this is shown, among other reasons, by the following:

Question 1: The trial court did not err in excluding from evidence petitioner's Exhibits 40 and 41 because:

(i) such exhibits were hearsay and are not, as petitioner claims, within the "learned treatise" exception to the hearsay rule; this exception is limited to standard scientific treatises or authoratative works published by an expert primarily for

the benefit of those in his profession (e.g., mortality and annuity tables, recognized business registers, standard medical treatises)—and does not include such items as legislative committee reports, which are on their face not "learned treatises" within the accepted meaning of that term. See *6 Wigmore, Evidence §§1690-1700 (3rd Ed. 1940)*;

(ii) neither exhibit was relevant or material to the present case (see fn. 3 above).

Question 2: The trial court did not err in rejecting the issues and instructions tendered by petitioner in regard to §7 of the Clayton Act because:

(i) there was no evidence whatever that Chrysler's acquisition of Simca stock substantially lessened competition, or tended to create a monopoly, in the relevant market—which was stipulated and agreed by petitioner to be the *entire automobile market* in the United States in general or in Dallas County in particular (R. 44-45, 56-60);

(ii) petitioner did not even purport to show that it was injured by the stock acquisition, but merely claimed that Chrysler's acquisition of Simca stock violated §7 of the Clayton Act *because of the effect of the resultant exclusive distributorship agreement* (R. 34-37, 51, 215-19); thus, petitioner had no standing to sue under §7 of the Clayton Act because it was not *directly* affected or injured by the stock acquisition alone;

(iii) petitioner could not predicate a §7 action upon the exclusive Simca distributorship agreement which, as found by the jury, was not an unreasonable restraint violative of §1 of the Sherman Act, and which was not "incipient" but fully consummated and existent.

Question 3: The trial court did not err in refusing to submit to the jury petitioner's requested issues and instructions regarding §2 of the Sherman Act because:

(i) petitioner expressly conceded that Chrysler and Simca did not have the economic power to fix prices and exclude competition from the relevant market — which was stipulated and agreed by petitioner to be the *entire automotive market* in the United States in general and in Dallas County in particular (R. 44-45, 55-56, 207-13);

(ii) the evidence established that Chrysler did not—by the acquisition of exclusive distributorship rights to a foreign car which represented only four tenths of one percent (.4%) of total automobile sales in the United States in 1958, and even less at trial (R. 255, 261-62, 381-82) — obtain the economic power to dictate prices of all products sold in, or exclude competing manufacturers from, the agreed relevant market, i.e., the market for all automobiles;

(iii) petitioner's altogether novel and unique theory of liability under §2 — that Chrysler violated this statute because its "monopoly" or economic power is to be judged, not in relation to competition afforded by other automobile manufacturers in the relevant market, but in relation to the economic position of the plaintiff who filed this suit —is patently erroneous.

Question 4: The trial court did not err in dismissing the purported common law action for tortious interference because:

(i) the alleged tortious interference with petitioner's purported Simca dealership agreement, which was in fact non-exclusive and terminable at will, was privileged in the interests of competition. *Kingsbery v. Phillips Petroleum Co., 315 S. W. 2d 561*

(Tex. Civ. App. 1958, error ref'd n.r.e.); Restatement, Torts §768, comment "c" (1939);

(ii) no action for tortious interference could be predicated on the interest alleged by petitioner—a sole and exclusive Simca dealership for Dallas County—which interest would be void and unenforceable under the Texas antitrust statutes, *Tex. Rev. Civ. Stat. art. 7428 (Vernon 1951);*

(iii) since petitioner attempted to assert two separate and distinct causes of action, one federal and one non-federal in character, the district court had no jurisdiction of this separate and independent non-federal claim (purported common law action for tortious interference), especially in view of the fact that the alleged federal claim (the purported antitrust violations) was not established. *Reidley v. Hudson Motor Car Co., 82 F. Supp. 8 (W.D. Ky. 1949).*

CONCLUSION

The present appeal does not, as petitioner claims, involve any conflict in decisions, any "vital procedural and evidentiary problems", or any question "superlatively important to the jurisprudence of this country". Nor has petitioner demonstrated any "niggardly procedural rulings" which prevented an adequate presentation of its case; to the contrary, a review of the Record reveals only two evidence rulings contrary to petitioner—exclusion from evidence of Exhibits 40 and 41—which were deemed important enough to warrant complaint on appeal (R. 119-21, 124, 190).

All of petitioner's liability evidence (except for these two senate subcommittee reports which were, without doubt, properly rejected by the trial court) and *all of petitioner's damage evidence was presented fully and completely by*

petitioner to the jury. Yet, the jury found not only that there was no unreasonable restraint of trade, but also that the exclusive distributorship agreement—upon which all four of the purported causes of action were admittedly based—did not damage petitioner. This finding of "no damages" is a complete answer to all of the claimed errors presented to the Court of Appeals and to this Court, since it conclusively precludes recovery under any of the legal theories asserted by petitioner.

Therefore, the decision below that "none of the four claimed errors can amount to reversible error" is clearly correct, and the Petition for Writ of Cetiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above Reply Brief were sent by United States mail, postage prepaid, to attorneys for petitioner, Gorham & Johnson, Inc., by sending the same to W. B. Harrell and Fred S. Abney, 1520 Republic National Bank Building, Dallas 1, Texas, this 16 day of January, 1963.

William D Abney